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IN THE

Supreme Court of the United States

October Term, 1949.

No. 415

JANE GRASSELLI BUZZI,

Respondent,

vs.

CESARE PIETRO BUZZI,

Petitioner.

Respondent's Brief in Opposition to Granting of Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner served upon the respondent copies of his petition for writ of certiorari but has not served upon respondent any copy of the printed record as required by Rule 38 of the United States Supreme Court Rules, and for that reason respondent is unable to cite folio numbers to portions of the record to which she refers. In petitioner's statement of the matter involved he has failed to advise the court of one very important portion of the record, namely, that before any default of petitioner was entered in the Superior Court of the State of California in and for the County of Orange, on the 28th day of February, 1941, but after petitioner had been served by

registered mail with a copy of the summons and complaint in said action, that petitioner, who is the defendant in the court below, through attorneys duly licensed to practice in all the courts of the state, filed a special appearance and motion to quash service of summons, together with written points and authorities in support thereof. This special appearance was filed in the Superior Court on February 10, 1941. The matter was fully argued on the 14th day of February, 1941, at which time it was denied by the court, the minute order being as follows:

> "In the Superior Court State of California County of Orange Dept. 1. In Open Court at 10:00 A. M. February 14, 1941. Present Hon. G. K. Scovel, Judge, Sheriff and Clerk.
>
> 38592 Buzzi v. Buzzi.
>
> Motion to quash summons.
>
> Motion denied. Defendant allowed 10 days to file appearance. Stay granted pending this period."

No further appearance was made or action taken by the defendant and thereafter default was entered, evidence taken, findings made and a decree of annulment entered. No appeal on matters of law alone was taken from the judgment which petitioner could have done without subjecting himself generally to the jurisdiction of the court.

Neither at the time of the special appearance to quash service of summons nor at the time of his motion to set aside the default or in the District Court of Appeal of the State of California, has petitioner ever claimed lack of jurisdiction of said court by reason of his being in the diplomatic or consular service of his country, and the first time this claim has been made in any court in which this matter has or will be considered is in his petition for writ of certiorari to this Honorable Court.

ARGUMENT.

POINT A.

Can a Defendant Who Has Specially Appeared Before a California Superior Court and Unsuccessfully Moved to Quash Service of Summons and Has Not Appealed From That Order and Judgment Has Been Entered Against Him by Reason of Default, Come Into Court Seven Years Later and Move to Set Aside the Default?

(1) A court has initial power to determine its own jurisdiction. In this action the order denying the motion to quash service of summons was made after a full hearing and submission. No appeal was taken from the judgment on matters of law only.

(2) In California an appeal may be taken on questions of law alone where a person specially appeared for the single purpose of objecting to the jurisdiction of the court over him as a party defendant and where his appeal is confined to that one question.

Roehl v. The Texas Co., 107 Cal. App. 691 (rehearing denied);

Clark v. Forbes, 34 Cal. App. 524;

Line v. Line, 75 Cal. App. 2d 723, 728;

Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 662;

Crackel v. Crackel, 17 Cal. App. 600.

(3) The question of jurisdiction of the Superior Court of the State of California, in and for the County of Orange, over the subject matter of the action and the person of the petitioner having been fully argued at the time of the hearing on the motion to quash, is final and con-

clusive as to the petitioner and not thereafter open to further attack. This case is very similar to the case decided by the Supreme Court in *Floy P. Baldwin v. Iowa State Traveling Men's Association, a corporation,* 283 U. S. 522-527, 75 L. Ed. 1244.

In that case a corporation proceeded specially in the U. S. District Court of Missouri to quash service of summons. After a hearing on affidavits and briefs the motion was overruled with leave to plead within thirty days. No plea was filed within that period, the cause proceeded and judgment was entered in the amount claimed. Thereafter a writ of certiorari was granted in the Supreme Court of the United States, seeking to void the judgment. The Supreme Court said:

> "The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. *Thomas v. Whitman,* 18 Wall. 457, 21 L. ed. 897; *Pennoyer v. Neff,* 95 U. S. 714, 24 L. ed. 565; *Hart v. Sansom,* 110 U. S. 151, 28 L. ed. 101, 3 S. Ct. 596; *Wetmore v. Karrick,* 205 U. S. 141, 51 L. ed. 745, 27 S. Ct. 434; *Bigelow v. Old Dominion Copper Min. & Smelting Co.,* 225 U. S. 111, 56 L. ed. 1009, 32 S. Ct. 641, Ann. Cas. 1913E, 875; *McDonald v. Mabee,* 243 U. S. 90, 61 L. ed. 608, L. R. A. 1917F, 458, 37 S. Ct. 343. It also had

the right to appeal from the decision of the Missouri district court, as is shown by *Harkness v. Hyde,* 98 U. S. 476, 25 L. ed. 237, *supra,* and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Floy P. Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522-527, 75 L. Ed. 1244.

It is interesting to note that the Supreme Court of California has approved this principle. In *Estate of Estrem,* 16 Cal. 2d 563, 570, the court said:

". . . the increasing tendency is to treat a finding by the original court of jurisdictional facts, whether as to person or subject matter, binding upon the court in which suit on the judgment is brought, when the question was originally duly litigated with proper notice and participation of all the parties affected by it. (*Baldwin v. Iowa State Traveling Men's Assn.,* 283 U. S. 522 (51 Sup. Ct. 517, 75 L. ed. 1244); . . ."

POINT B.

Petition for Writ of Certiorari Is Directed to the Wrong Court.

We respectfully call attention to the fact that petitioner requests the writ to be issued to the Supreme Court of the State of California to review its judgment entered in this case on July 18, 1949. The Supreme Court of California rendered no judgment or opinion in this case. The District Court of Appeal rendered its decision and opinion in this case on May 13, 1949. On July 7, 1949, the Supreme Court of California denied a hearing without opinion in the case. There was no order, judgment or decision by the Supreme Court of California on July 18, 1949, and the only order of the Supreme Court was on July 7, 1949, "Hearing denied." Inasmuch as the Supreme Court of California declined to hear the case after a unanimous decision of the District Court of Appeal of the State of California, Fourth Appellate District, the decision of the District Court of Appeal became final and the last word of the courts of the State of California.

POINT C.

Respondent at the Time of the Commencement of This Action Was a Resident of California With the Consent of the Petitioner.

Paragraph XII of the Findings of Fact and Conclusions of Law of the Superior Court of the State of California, in and for the County of Orange, reads as follows:

> "The court further finds that on or about August 10, 1939, the parties entered into a separation agreement in writing, duly executed and delivered by each party to the other, which separation agreement was duly amended by the parties on August 28, 1939. That in said separation agreement, as amended, the defendant consented that the plaintiff acquire a separate home and legal domicile, together with her child, Maria Angela, in the State of California, in the United States of America. That pursuant to said consent given in said separation agreement, as amended, the plaintiff did, on or about the 15th day of January, 1940, come to the State of California for the purpose and with the intent of making it her legal domicile and place of residence and the domicile and place of residence of her child, Maria Angela. That plaintiff and her child, on or about said date, did make and ever since have made the State of California their legal place of domicile and residence, and are now domiciled and residing in the State of California."

This finding was in response to the allegation of paragraph VII of the complaint which reads as follows:

> "On or about the 15th day of January, 1940, with the consent of the defendant, plaintiff came to the State of California and has resided in said state ever since."

Answer to Point One of Petitioner's Brief.

In the California Civil Code all actions involving *either annulment or divorce* are to be found in Chapter II of Title 1 of Part 3 of Division 1 of the Civil Code of California under the title "Divorce." Section 82 of the Civil Code gives the grounds upon which a marriage may be annulled, and subdivision Four provides:

> "That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife."
>
> Section 82 Civil Code, Subdivision Four.

A marriage status therefore was created by the marriage of petitioner and respondent. The marriage status would have continued to exist if the other party, after obtaining full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife. The contract, under the California law became valid and created a status, and the contract was not void but only voidable. As the District Court of Appeal of the State of California so succinctly stated in the case at bar "in such a case the very purpose of the action is to end an existing status which would otherwise continue, rather than to declare that no such status ever existed." The case is far different than if either of the parties to the marriage had an existing marriage undissolved, in force with a former husband or wife because in that case the marriage would be absolutely void from the beginning. It is generally acknowledged in California that an annulment, like a divorce action, concerns the *marriage status* of the parties. *Bishop* states:

> "A suit to declare a marriage void from the beginning concerns the marriage status precisely like one

to break the marriage bond for a post nuptial *delictum*. Therefore it may be and should be carried on in the courts of the domicile."

Bishop on Marriage, Divorce and Separation, par. 73.

Of late years, practically all the courts and all the text writers have adopted Bishop's self-evident statement—that is, *that in an annulment suit, the court is dealing with a marital status.*

Restatement of Law, Conflict of Laws, Sec. 115;

18 *Cal. Law Review,* p. 105;

14 *So. Cal. Law Review,* p. 70.

The status of a person domiciled in a state is a matter *in rem* and the court of said domicile has jurisdiction to determine that status.

Delanoy v. Delanoy, 216 Cal. 27, 32.

California courts have consistently held that an annulment action involves a question of the marriage status of the parties.

In *Linebaugh v. Linebaugh,* 137 Cal. 26, at 27, in an action to annul a marriage upon the ground that the plaintiff's consent was obtained by duress, threats, and intimidation, the court stated:

". . . 'Marriage' means, generally a certain existing relation or *status* and 'a marriage' can mean nothing more than this same *status* as existing between two particular persons. Section 82 assumes that the married relation exists between the parties to the action, and that this relation may be annulled when the consent of either party was obtained by force,

'unless such party afterwards freely cohabited with the other as husband or wife.' It clearly contemplates that such marriage is not absolutely void, but only voidable at the instance of the aggrieved party, who may have it annulled by a decree of court. The section would be idle and vain if it proposed merely to annul a nullity."

Linebaugh v. Linebaugh, 137 Cal. 26, 27.

In *Estate of Eichoff,* 101 Cal. 600, at 605, the court stated:

"The decree annulling the marriage was a judicial determination of the *status* of the parties thereto. It did not render the marriage void, but simply declared that it had been void, and the marriage thereby annulled is to be regarded as never having, in fact, existed, except in so far as was necessary to protect the civil rights that others may have acquired in reliance upon its apparent validity."

Estate of Eichoff, 101 Cal. 600, 605.

In *Marshall v. Marshall,* 212 Cal. 736, 739, an action in which the plaintiff sought to annul the marriage for fraud, the court pointed out that a marriage contract differed from an ordinary contract, stating:

"It creates a status which society is interested in maintaining."

Marshall v. Marshall, 212 Cal. 736, 739.

The most recent California case before the case at bar adopted a similar view. It is the case of *Bing Gee v. Chan Lai Yung Gee,* 89 A. C. A. 1030, also decided by the District Court of Appeal, February 2, 1949. To the same effect, *Piper v. Piper,* 46 Wash. 671 (91 Pac. 189).

It is interesting to note that in California there is no statute specifically providing for publication of summons in either cases of divorce or annulment, but *publication of summons is provided by general law* in Section 412 of the Code of Civil Procedure for all nonresident defendants and this has been applied as applicable to all cases of divorce and in the later cases of annulment where the contract of marriage is merely voidable and not void.

Bing Gee v. Chan Lai Yung Gee, 89 A. C. A. 1030.

Answer to Point Two of Petitioner's Brief.

This point, we believe, is fully answered in our Point A of this brief. We did not desire to argue this matter as an answer to Point Two because the statement of the matter involved in the petition did not call the attention of this court to the fact that before the entry of any default, petitioner had specially appeared in said action to move to quash the service of summons and *his motion had been denied, and no appeal had been taken therefrom;* that therefore the ruling of the Superior Court was *res judicata* as to petitioner.

Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522 (51 Sup. Ct. 517, 75 L. Ed. 1222).

Answer to Point Three of Petitioner's Brief.

We submit that our answer to this point is fully contained in our answer to Point One and that this point is in effect merely a restatement of the particulars involved in petitioner's Point One. We, however, desire to call to this Honorable Court's attention the fact that in none of the pleadings or proceedings has petitioner ever claimed any property rights, and we desire further to call this

Honorable Court's attention to Section 1408 of the Probate Code of the State of California, as follows:

> "Rights as between parents. As between parents claiming the guardianship adversely to each other, neither is entitled to priority; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."
>
> Probate Code of the State of California, Section 1408.

Answer to Point Four of Petitioner's Brief.

Again we must call attention to the fact that the question propounded in petitioner's Point Four and petitioner's Point One are identical and that our answer to Point One is a complete answer to Point Four. Petitioner has never contended and cannot contend that he did not receive a true and correct copy of summons and complaint in the action filed against him prior to the time he employed California counsel to appear in the Superior Court of Orange County to move to quash the service of said summons and complaint. He was fully and completely advised of all of its contents and elected to permit the default judgment to become final without taking an appeal therefrom which was open to him without submitting himself to the general jurisdiction of the court.

Answer to Point Five of Petitioner's Brief.

We respectfully call to the court's attention that this point, although known to the petitioner, has not been raised in any former steps of this proceeding.

(a) It was not made one of the grounds for the motion to quash service of summons.

(b) It was not made one of the grounds for the motion to set aside default.

(c) It was not made one of the grounds on appeal to sustain the action of the Superior Court in setting aside the default.

(d) It was not one of the grounds for a petition for hearing in the Supreme Court of California.

For the first time it is raised in a petition to this court for a writ of certiorari. It appears to us to be an afterthought. The affidavit set forth on page 25 of petitioner's brief is not a part of the judgment roll. It is an affidavit required by the Soldiers' and Sailors' Relief Act. The applicable portion of Section 670 of the Code of Civil Procedure of the State of California reads as follows:

> "(Judgment roll; Papers constituting roll.) In superior courts and municipal courts the following papers, without being attached together, shall constitute the judgment roll:
>
> 1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment;

> if defendant has appeared by demurrer, and such demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of such service; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons; . . ."
>
> Section 670 Code of Civil Procedure, Subsection 1.

The affidavit here quoted is simply the affidavit required by the clerk before the judgment would be entered, to show that the defendant "is not now in the military service of the United States of America."

The fact also appears that neither at the time of the commencement of the action nor at any time subsequent thereto was the petitioner a member of the diplomatic or consular service of Italy with location or duty in the United States of America.

Finally, it would seem *Ohio ex rel Popovici v. Agler*, 280 U. S. 379, is a complete answer to this claim of petitioner.

Conclusion.

Wherefore, respondent prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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